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Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1533~~ 70-109

MILAN M. VUITCH, M.D., *Petitioner,*

v.

STATE OF MARYLAND, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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MILAN M. VUITCH, M.D., *Petitioner,*

v.

STATE OF MARYLAND, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Petitioner respectfully prays that a writ of certiorari issue to the Court of Special Appeals of Maryland to review the judgment affirming the conviction of petitioner in the Circuit Court of Montgomery County, Maryland.

CITATION TO OPINION AND ORDERS BELOW

The opinion of the Court of Special Appeals of Maryland is reported at 10 Md. App. 389 and 271 A. 2d 371, and is attached as Appendix B hereto. The

Mandate of the Court of Special Appeals, which contains the official notation of the denial of a Motion for Reargument and Stay of Mandate, is unreported but attached hereto as Appendix C. The Order of the Court of Appeals of Maryland denying a Petition for Certiorari to the Court of Special Appeals is unreported but attached hereto as Appendix D.

JURISDICTION

The Judgment of the Court of Special Appeals of Maryland was entered on November 24, 1970. A timely Motion for Reargument and Stay of Mandate was filed on December 18, 1970, and was denied on January 22, 1971 (App. C). A timely Petition for Certiorari to the Court of Special Appeals of Maryland was filed on January 28, 1971, and denied by Order of February 9, 1971 (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Under *Henry* v. *Mississippi,* 379 U.S. 443 (1965), can Maryland, consistently with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, foreclose a constitutional attack on the governing statute on the ground that it was not raised pretrial, when it was raised three times during trial, decided by the trial court and raised three times on appeal?

2. Under *Henry* v. *Mississippi, supra,* can Maryland, consistently with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, hold that petitioner forfeited important constitutional rights by failing to comply with a procedural rule not previously clearly announced and never before applied?

CONSTITUTIONAL AMENDMENT STATUTES AND RULES INVOLVED

The Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, Maryland Code Annotated, Art. 43, §§ 137-139 (Cum. Supp. 1970) and Rules 725, 755 and 1071 of the Maryland Rules of Procedure are attached hereto as Appendix A.

STATEMENT

Petitioner is a physician licensed to practice medicine in the States of Maryland and New York, the Commonwealth of Virginia and the District of Columbia. He was convicted in the Circuit Court of Montgomery County, Maryland, on charges of having performed an abortion in violation of Maryland law, *i.e.*, at "a location which is not a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene * * * " (Md. Code Ann., Art. 43, § 139 (Cum. Supp. 1970).)[1] A sentence of three years' imprisonment (with two years to be suspended after one year is served) and $5,000 fine was imposed. Subsequent to sentencing, petitioner was admitted to bail pending appeal.[2]

His trial was held in early July 1969. At trial, petitioner, through his counsel, filed a written motion for judgment of acquittal pursuant to Rule 755 of the

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[1] The Maryland Court of Special Appeals designated the abortion statutes as Md. Code Ann., Art. 43, §§ 149E-G. On July 1, 1970, these statutes were renumbered by Md. Acts of 1970, ch. 736, and now appear at the sections cited herein.

[2] On February 16, 1971, after the Maryland Court of Appeals had denied his Petition for Certiorari, the Circuit Court for Montgomery County admitted petitioner to bail pending the filing and disposition of this Petition.

Maryland Rules of Procedure. This motion was based in part on his contention that the abortion statute under which he was charged is "invalid and unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution." (*Vuitch* v. *Maryland*, 10 Md. App. 389, 394, 271 A.2d 371, 374 (Ct. Spec. App. 1970)). The trial judge denied the motion without comment.

At the close of the evidence, petitioner's counsel renewed this motion, and the trial judge denied it, again without comment. Before sentencing, petitioner's counsel moved for a new trial, and again asserted his constitutional attack upon the statute. In denying relief, the trial court finally commented on the constitutional issues involved:

> The second contention of the Defendant is that the Statute under which Defendant is charged is unconstitutional as being a denial of equal protection of the laws in accordance with the *Griswold* case [*Griswold* v. *Connecticut*, 381 U.S. 479]. The Court does not see that the instant case is comparable factually to *Griswold* and finds no denial here as charged. [*State* v. *Vuitch*, (Mont. Cy. Cir. Ct., Crim. No. 9954), Ruling on Motion For New Trial, dated November 16, 1969.]

On appeal to the Maryland Court of Special Appeals, petitioner reasserted his constitutional challenge to the statute, but the Court refused to decide it. Affirming the conviction, the Court ruled that the "constitutional issues * * * were not properly preserved for appellate review." (10 Md. App. at 397, 271 A.2d at 376.) The Court's ruling was grounded upon its conclusion that:

> The motion for judgment of acquittal is not an appropriate vehicle to challenge the constitution-

> ality, facial or otherwise, of the statute under which the criminal prosecution is initiated. [10 Md. App. at 397, 271 A.2d at 376.]

According to the Court, petitioner thus had effectively waived his right to question the statute under which he was convicted, by reason of his failure to assert his constitutional challenges by a pre-trial motion pursuant to Maryland Rule 725(b), which provides in pertinent part:

> Defenses and objections based on defects in the institution of the prosecution or in the indictment, other than that it fails to show jurisdiction in the court or to charge an offense, must be raised by motion before trial.

At the same time, however, the Court did acknowledge the public importance of a prompt and conclusive adjudication of the constitutionality of Maryland's abortion statute:

> In concluding that the constitutional questions now sought to be raised were not properly preserved for appellate review, we do not seek to delay the day when these *important public issues* must be squarely met and decided, either by us, or the Court of Appeals of Maryland. [10 Md. App. at 397, 271 A.2d at 376 (emphasis added).]

In a timely Motion for Reargument and Stay of Mandate, filed December 18, 1970, petitioner urged that the case be remanded, pursuant to Maryland Rule 1071,[3] for full adjudication of the substantial con-

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[3] This Rule is set forth in pertinent part as follows:

> 'If it shall appear to this Court that the *substantial merits of a case will not be determined* by affirming, reversing or modifying the judgment from which the appeal was taken,

stitutional issues involved herein. This motion was based partly on the fact that the procedural rule enforced by the Court was at best unclear and it was therefore unfair to hold that petitioner had forfeited his right to an adjudication of the constitutionality of the statute under which he had been convicted.

Petitioner's Motion for Reargument was also keyed to the observation by the Court of Special Appeals that:

> [I]t would be foolhardy in the extreme to undertake the resolution of such *complex constitutional questions* upon a record as procedurally and substantively deficient as that now before us * * *. [10 Md. App. at 397, 271 A.2d at 376 (emphasis added).]

Accordingly, petitioner sought a remand for the full presentation and development of his challenge on constitutional grounds to the Maryland abortion statute.

Despite its statement that petitioner's case involved constitutional issues of public importance which should be promptly decided, the Court denied petitioner's motion on January 22, 1971, without an opinion.

On January 28, 1971, less than one week later, petitioner filed a Petitioner for Certiorari with the Court of Appeals of Maryland. Petitioner's Petition for Certiorari was denied by that Court on February 9, 1971.

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or that the *purposes of justice will be advanced by permitting further proceedings* in the cause, either through amendment of the pleadings, introduction of additional evidence, or otherwise, then this Court * * * order the case to be remanded to the lower court. [Emphasis added.]

REASONS FOR GRANTING THE WRIT

I

This petition raises important questions concerning the duty of state courts to pass upon challenges to the constitutionality of state criminal statutes. Charged with the first-line protection of constitutional rights, state courts cannot consistently with prior decisions of this Court fashion new procedural rules and then invoke them without notice to deny an accused the right to test the constitutionality of the governing criminal statute.

That is exactly what occurred in this case. Petitioner sought three times during the trial stages, and three times on direct appeal, to obtain a decision on his claim that Maryland's abortion statute was defective under the Federal Constitution. The Maryland appellate courts have ruled that petitioner waived his constitutional claims by asserting them by motions for acquittal, directed verdict and new trial rather than by a pre-trial motion to dismiss the indictment. We submit that it is a denial of due process and equal protection for Maryland to exact such a high price for failure to observe a procedural rule which is neither clear, reasonable or clearly announced ahead of time.

II

Henry v. *Mississippi*, 379 U.S. 443 (1965), compels either that the judgment below be reversed or that the case be remanded for a hearing on petitioner's constitutional claims. In *Henry*, also a criminal case, petitioner failed to make a contemporaneous objection to the introduction of evidence obtained through an allegedly unlawful search. Petitioner did challenge the

search in a motion for a directed verdict at the close of the State's case, and renewed this motion at the close of all the evidence. The Mississippi Supreme Court affirmed the conviction, holding that petitioner's failure to follow the state procedural rule requiring an objection to illegal evidence at the time it is introduced prevented him from asserting his constitutional claim.

But this Court disagreed,[4] distinguishing between state substantive and procedural grounds for decision:

> [T]he adequate nonfederal ground doctrine is necessary to avoid advisory opinions.
>
> These justifications have no application where the state ground is purely procedural. A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right. [*Id.* at 447.]

Referring to earlier cases, the Court cited the proposition that:

> [A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. [*Ibid.*]

The Court itself undertook an analysis of the state procedural rule and found that it did serve a legitimate state interest—that of giving the trial court the oppor-

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[4] The Court's decision in *Henry* was fully consistent with prior opinions which establish that state procedural rules cannot be utilized to frustrate the vindiction of federal rights. *E.g., Liner* v. *Jafco, Inc.*, 375 U.S. 301 (1964), and *Wright* v. *Georgia*, 373 U.S. 284 (1963).

tunity to conduct the trial without tainted evidence. However, the Court also found that the purpose of the rule may have been served by the procedure petitioner actually did use:

> But on the record before us it appears that this purpose of the contemporaneous-objection rule may have been substantially served by petitioner's motion at the close of the State's evidence * * * For at this stage the trial judge could have called for elaboration of the search and seizure argument and, if persuaded, could have stricken the tainted testimony or have taken other appropriate corrective action. [*Id.* at 448.]

Because the record disclosed a possibility that petitioner had waived his objection within the meaning *Fay* v. *Noia*, 372 U.S. 391 (1963), however, the Court remanded to the state courts for a hearing on that issue.

The Court's approach in *Henry* is equally applicable here. Even assuming that Maryland's procedural rule is reasonable, "clearly announced," and serves a legitimate state interest—all of which we dispute—the purpose of the rule was served by petitioner's other motions. No delay was introduced into the trial proceedings, and the trial court had ample opportunity to take any evidence and hear argument it thought was appropriate. This is all that is required of an accused who seeks to assert his constitutional rights. As this Court early stated:

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with precision and in due time. [*New York ex rel Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928).]

If anything, petitioner's case is stronger than *Henry* v. *Mississippi*. There, the procedural rule enforced by the state Court was clear and established. Here it was neither. To the contrary, the Maryland courts for the first time in this case have held that a challenge to the constitutionality of a statute is lost if not raised by pre-trial motion. The application of a new rule to deprive petitioner of constitutional rights stands in clear conflict with prior decisions of this Court.[5] The Maryland court virtually conceded that this case presented a new application of Rule 725, which is virtually identical to Rule 12 of the Federal Rules of Criminal Procedure,[6] when it stated:

> And while we need not determine the question in this case, it would appear beyond any doubt that such a constitutional challenge would constitute a defense or objection under Rule 755b [sic] "based on defects in the institution of the prosecution or in the indictment other than that it fails to show jurisdiction in the court or to charge an offense"—a defense or objection which may be waived unless presented by motion before trial. [10 Md. App. at 398, 271 A.2d at 376-77 (citing authorities).]

While the Court cites three cases for this point, in none of these was an attack on a statute involved. In *Ward*

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[5] For example, in *NAACP* v. *Alabama*, 357 U.S. 449 (1958), the Court stated:

> Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights. [*Id.* at 457-58.]

[6] Though the Maryland court noted the similarity between the rules, it failed to note that in federal procedure the unconstitutionality of a statute constitutes a failure of the indictment "to charge an offense," which does not have to be raised pre-trial. 8 MOORE, FEDERAL PRACTICE ¶ 12.03[2].

v. *Maryland,* 9 Md. App. 583, 267 A.2d 255 (Ct. Spec. App. 1970), appellant claimed that the indictment did not charge the common law offense of keeping a disorderly house; in *Morrissey* v. *Maryland,* 9 Md. 470, 265 A.2d 585 (Ct. Spec. App. 1970), appellant was deemed to have waived objection to duplicity in an indictment by failing to file a Rule 725 motion and by not raising the point otherwise at trial; and in *Reagan* v. *Maryland,* 4 Md. App. 590, 244 A.2d 623 (Ct. Spec. App. 1968), appellant properly preserved his objection that the indictment failed to state an offense by a motion for judgment of acquittal.

In a preliminary review of the Maryland cases,[7] we have been able to find no other case in which the Maryland Court refused to consider a challenge such as petitioner's because it had not been raised by a Rule 725 motion, and the State cited no such case in its brief to the Maryland Court of Special Appeals. Indeed, the Maryland Court in several instances reached the merits of constitutional claims similar to petitioner's even though such claims had *not* been raised below by Rule 725 motions. *E.g., Shrout* v. *Maryland,* 238 Md. 170, 208 A.2d 585 (1965) (attack on search warrant); *Bailey* v. *Maryland,* 6 Md. App. 496, 252 A.2d 85 (Ct. Spec. App. 1969) (objection to in-court identification; no motion to exclude or suppress evidence; no objection to admission of evidence); *Kyle* v. *Maryland,* 6 Md. App. 159, 250 A.2d 314 (Ct. Spec.

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[7] In a successful attempt to secure an order admitting him to bail pending the filing and deposition of the Petition, petitioner promised to file this petition by March 31, 1971 as opposed to May 10, 1971, as permitted by this Court's Rules. Thus petitioner has not had the normal amount of time in which to prepare his Petition.

App. 1969) (double jeopardy objection raised by motion for judgment for acquittal).

In those cases cited where the Court refused to consider attacks on criminal statutes, appellant had not raised the constitutional challenge at all during trial, much less three times.[8] Moreover, in the only cases cited where the Court did pass upon the constitutionality of criminal statutes, the Court did not indicate how the statutes were attacked at trial, whether by a pre-trial motion or otherwise. *Lashley* v. *Maryland*, 10 Md. App. 136, 268 A.2d 502 (Ct. Spec. App. 1960), *appeal docketed*, 39 U.S.L.W. 3347 (U.S. Mar. 8, 1971); *Bacheller* v. *Maryland*, 3 Md. App. 626, 240 A.2d (Ct. Spec. App. 1968). Thus the rule applied here, even if in existence at the time of petitioner's trial, was not "clearly announced" as required by this Court. (*Henry* v. *Mississippi*, *supra*, 379 U.S. at 448, n. 3).

Implicit in the opinion below is the notion that petitioner waived his objection to the Maryland abortion statute. The State argued this, and Rule 725, which the court deemed applicable, provides that certain matters not raised pre-trial are waived.[9]

It is clear, however, that petitioner did not waive his right to contest the validity of Maryland's abortion statute. Where federal constitutional rights are involved, the question of waiver is itself a federal question. *E.g.*, *Henry* v. *Mississippi*, *supra*, 379 U.S. at 447; *Love* v. *Griffith*, 266 U.S. 32, 33-34 (1924); see

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[8] *Luthardt* v. *Maryland*, 6 Md. App. 251, 251 A. 2d 40 (Ct. Spec. App. 1969); *Iozzi* v. *Maryland*, 5 Md. App. 415, 247 A.2d 758 (Ct. Spec. App. 1968); *Woodell* v. *Maryland*, 2 Md. App. 433, 234 A. 2d 890 (Ct. Spec. App. 1967).

[9] Even so, the rule itself provides that the Court "for cause shown may grant relief from the waiver." (App. A.)

Liner v. *Jafco, Inc.*, 375 U.S. 301 (1964). Waiver has been defined by this Court as the "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). This Court has always entertained every reasonable presumption against the waiver of important constitutional rights, finding no waiver absent affirmative conduct evidencing deliberate and conscious rejection of a constitutional guarantee. *E.g., Carnley* v. *Cochran*, 369 U.S. 506 (1962). Obviously, there was no waiver here. While petitioner or his counsel may have picked what the Maryland court determined later to be the wrong procedural vehicle for raising his claim, petitioner certainly did not knowingly abandon it. *E.g., Whitus* v. *Balkcom*, 333 F.2d 496 (5th Cir. 1964).

The timing of petitioner's trial is important. Although the constitutional issues surrounding abortion statutes have now been defined—but certainly not answered—this was not true in the summer of 1969. Moreover, petitioner did not then have the factual material available now. Cognizant of the present opportunity for full and factual adjudication of these important issues, petitioner sought a remand, permitted by Maryland procedure, for exploration of these matters. The Court of Special Appeals denied this relief, without opinion.

III

The underlying issues are of obvious social and constitutional importance. Questions concerning the constitutionality of Maryland's abortion statute, asserted time and again below, have a direct bearing on extraordinarily important personal decisions and conduct of Maryland women and their families. These questions do not have just academic interest. One national study

showed 4.7 million unwanted births from 1960 to 1965, approximately two million of which occurred among the economically distressed.[10] Moreover, estimates indicate that 200,000 to 1,000,000 unwanted pregnancies each year end in abortions brought about outside of the clinical setting,[11] in situations ofter fraught with danger to health and life of the pregnant woman.

The statute under which petitioner was convicted is subject to serious constitutional question from the standpoint of Maryland women and their families. While women in a number of states have had the benefit of decisions invalidating abortion statutes,[12]

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[10] This study, co-authored by Professor Charles Westoff of Princeton University, executive director of the Presidential Commission on Population Growth and the American Future, showed the following results:

> [I]n the period 1960 to 1965 there were 4.7 million births that would have been prevented by "perfect contraception." These births represent one-fifth of all births during the period. Approximately 2 million of these unwanted births occurred among the poor and the near-poor * * *. [Bumpass & Westoff, The *"Perfect Contraceptive"* Population, 169 SCIENCE 1177, 1179 (1970).]

[11] Secretly induced abortions are inherently incapable of quantification. Nonetheless, the number is very high. For estimates, see Fisher, *Criminal Abortion*, in ABORTION IN AMERICA 3-6 (H. Rosen ed. 1967); M. CALDERONE (ed.), ABORTION IN THE UNITED STATES 180 (1958); P. BEVHARD *et al.*, PREGNANCY BIRTH AND ABORTION 136-137 (1958).

[12] *California* v. *Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970); *United States* v. *Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969), *appeal docketed*, 39 U.S.L. W. 3019 (U.S. Mar. 2, 1970) (No. 84); *Roe* v. *Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), *appeal docketed*, 39 U.S.L. W. 3151 (U.S. Oct. 16, 1970) (No. 808); *McCann* v. *Babbitz*, 310 F. Supp. 293 (E.D. Wis.) (per curiam), *appeal dismissed*, 400 U.S. 1 (1970); *Doe* v. *Scott*, — F. Supp. —, No. 70-C-395 (N.D. Ill. Jan. 29, 1971).

often in cases where the constitutional claims were raised by their physicians,[13] Maryland women and their physicians have thus far been deprived of such an adjudication.[14]

That substantial constitutional issues are involved here needs no elucidation; one court defined the basic question as the "fundamental right of the woman to choose whether to bear children."[15] This Court now has before it at least ten other cases presenting various constitutional aspects of anti-abortion legislation,[16] including one case involving this petitioner,[17] and another involving a statute with the same provision as

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[13] The standing of a physician to assert both his own rights and those of his patients has gone unquestioned by the lower courts in the context of therapeutic abortion litigation. Reliance is invariably placed on *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965). *See, e.g., Roe* v. *Wade*, *supra*, 314 F. Supp. at 1220 n.3.

[14] In *Lashley* v. *Maryland*, 10 Md. App. 135, 268 A.2d 502 (1960), *appeal docketed*, 39 U.S.L.W. 3347 (U.S. Mar. 8, 1971) (No. 1328), the Maryland Court did decide that the state had the constitutional authority to require that abortions be performed by licensed physicians such as petitioner.

[15] *California* v. *Belous*, *supra*, 71 Cal. 2d at 963, 458 P.2d at 199, 80 Cal. Reptr. at 359 (1969).

[16] The cases are: *United States* v. *Vuitch*, *supra*; *Hodgson* v. *Randall*, *appeal docketed*, 39 U.S.L. W. 3228 (U.S. Sept. 22, 1970) (No. 728); *Hodgson* v. *Minnesota*, *appeal docketed*, 39 U.S.L. W. 3203 (U.S. Sept. 21, 1970) (No. 729); *Roe* v. *Wade*, *supra*; *Doe* v. *Bolton*, *appeal docketed*, 39 U.S.L. W. 3333 (U.S. Nov. 14, 1970) (No. 971); *Rosen* v. *Louisiana Bd. of Medical Examiners*, *appeal docketed*, 39 U.S.L. W. 3302 (U.S. Nov. 27, 1970) (No. 1010); *Abodeely* v. *Iowa*, *appeal docketed*, 39 U.S.L. W. 3314 (U.S. Jan. 13, 1971) (No. 1230); *Lashley* v. *Maryland*, *supra*; *McCann* v. *Babbitz* (II), *appeal docketed*, 39 U.S.L. W. 3362 (U.S. Feb. 16, 1971) (No. 1353); *Rodgers* v. *Danforth*, *appeal docketed*, 39 U.S.L. W. 3390 (U.S. Mar. 8, 1971) (No. 1402).

[17] *United States* v. *Vuitch*, *supra*. Argument was heard on this case by the Court on January 12, 1971.

the Maryland statute under which petitioner was convicted here.[18]

The Maryland statute presents constitutional difficulties of significant dimension. As just one example, the statute permits therapeutic abortions if

> (2) There is substantial risk that continuation of the pregnancy would gravely impair the physical or mental health of the mother * * * [Md. Code Ann., Art. 43, § 137 (Cum. Supp. 1970).]

There is substantial question whether such a statutory standard is not unconstitutionally defective for vagueness.[19] Thus on the one hand, physicians may define the concept of "health" broadly along lines suggested by the World Health Organization:

> "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[20]

On the other hand, judges and jurors may interpret the "health" concept narrowly, restricting "mental health" abortions to cases of preexisting psychosis accompanied by institutionalization. The first definition permits therapeutic abortion in cases where a patient represents that a pregnancy is unwanted. The second is highly restrictive and would sanction exceedingly few "mental health" abortions. The vast majority of therapeutic abortions fall between the two extremes, in an area wholly without statutory illumination.

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[18] *Doe* v. *Bolton*, *supra*. In *Doe*, however, the record does not contain the factual materials now available to a court passing upon the constitutionality of the Maryland statute.

[19] See *United States* v. *Vuitch*, *supra*, 305 F. Supp. at 1034.

[20] *Constitution of the World Health Organization*, in BASIC DOCUMENTS OF THE WORLD HEALTH ORGANIZATION 1 (Geneva 1969 ed.).

Factual materials available now—but not at the time of petitioner's trial—make petitioner's case an ideal vehicle for the constitutional adjudication to which petitioner and other Maryland citizens are entitled. These materials also demonstrate a substantial probability that the Maryland statute is unconstitutional.

The statute requires that therapeutic abortions be performed only "in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene * * *" (Md. Code Ann. Art. 43, § 137 (Cum. Supp. 1970). Maryland confines no other medical procedures solely to accredited hospitals, and there is no rational basis on which therapeutic abortions can be so singled out, particularly since properly induced abortions are safer than ordinary childbirth.[21]

The statute also provides that no person, hospital, or governing board shall be required to approve, permit or perform a therapeutic abortion. (Md. Code Ann., Art. 43, § 138 (Cum. Supp. 1970). When combined with the hospitalization requirements, this provision can effectively deny physicians and their patients access to therapeutic abortions. Accordingly, no hospital is required by the statute to permit staff physicians to perform therapeutic abortion. No hospital is told by the statute or state health department whether to interpret the provisions generously or rigidly. No hospital is forbidden to exclude out-of-state patients or indigent patients. In effect, the statute *explicitly* delegates to the hospital governing boards full authority to abrogate any rights granted to physi-

[21] For a helpful review of pertinent statistics and other materials, see *California* v. *Belous*, *supra*.

cians or patients under permissive provisions of the statute.

As required by the statute,[22] the Maryland Department of Health and Mental Hygiene has maintained data concerning therapeutic abortions under the statute. These data, not available at trial,[23] are now accessible to petitioner and thus can provide the basis for an informed adjudication of the constitutional issues presented.

Certain of the available statistical data have been included as Appendix E hereto.[24] These materials show that, as applied, the hospitalization requirement in the statute has drastically limited the availability of voluntary abortion. Thirteen accredited hospitals reported no therapeutic abortions at all for the first year of the Act, July 1, 1968 to June 30, 1969. Physicians and patients dependent upon these thirteen hospitals were completely denied any rights under the statute.

All accredited hospitals reported only 2134 therapeutic abortions for the same period. By contrast, a nearby state permitting therapeutic abortion on request, in clinics as well as hospitals, recorded an abor-

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[22] Md. Code Ann., Art. 43, § 137(c) (Cum. Supp. 1970).

[23] The *Report on Therapeutic Abortions for Fiscal Year July 1, 1968 to June 30, 1969* was not released until May 14, 1970, almost a full year after petitioner's trial.

[24] These materials consist of reports by the responsible state official and tables assembled by petitioner from public documents and internal memoranda obtained from the Maternity and Family Planning Section, Division of Maternal and Child Health, Maryland Department of Health and Mental Hygiene.

tion rate 48 times as great.[25] This comparision indicates the extent of the restriction imposed by the Maryland statute. Moreover, the distribution of therapeutic abortions in Maryland for the first year was irregular. Six out of thirty-nine hospitals performed fully 88 per cent of all therapeutic abortions.

As the data indicate, physicians and their patients have been subjected to widely varying therapeutic abortion practices under the Maryland statute. Similarly situated individuals have not been accorded equal rights under the therapeutic abortion law. "Mental health" under the statute means one thing in Montgomery General Hospital and quite another in the Johns Hopkins Hospital. Indeed, "mental health" had a different meaning in 1969 from that in 1970.

This case is ripe for state court adjudication of public issues in which Maryland has a paramount interest. Moreover, the fact that the materials adverted to above were never before available demonstrates that petitioner's failure to develop an evidentiary record at the trial level was due not to any waiver of important constitutional rights, inexcusable neglect, or misjudgment, but rather to the simple unavailability of the materials required.

CONCLUSION

Petitioner has a constitutional right not to be labeled a criminal and incarcerated for violating a statute which offends the Federal Constitution. He also has a

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[25] *Preliminary Report on Abortions Performed in New York State From July 1—October 31, 1970* (N.Y. State Dep't of Health Dec. 17, 1970). The New York Report, issued by Commissioner Hollis S. Ingraham, M.D., reported 34,175 induced abortions for the first four months under recent legislation in that state. This amounts to a projected 102,525 for twelve months, which is 48.0 times as large as the first year Maryland total of 2,134.

concomitant right, equally important, to contest the validity under the Constitution of the statute under which he has been charged, *Reece* v. *Georgia,* 350 U.S. 85 (1955), and he must be given "a reasonable opportunity to have his federal questions passed upon by the state court." *Parker* v. *Illinois,* 333 U.S. 571, 575 (1948).

Henry v. *Mississippi* came to the Court on direct appeal; and there petitioner had been guilty of a procedural omission clear under state law. This Court remanded to the state court. The Court should do the same here, where petitioner's procedural default, if any, was his failure to comply with a hyper-technical procedural rule announced for the first time in this case. We respectfully submit that the Fourteenth Amendment does not permit so unwitting a forfeiture of important constitutional claims.

Respectfully submitted,

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